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12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA

15 MONARCH CONSULTING, INC. dba
PES PAYROLL,

16 Plaintiff,

17 v.

18 SPECIALTY RISK SERVICES, LLC,

19 Defendants.

Case No. **CV11-01764 DSF (AGR)**

**SPECIALTY RISK SERVICES,
LLC'S MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

[F.R.C.P. 16 AND Local Rule 16-4]

20
21 SPECIALTY RISK SERVICES, LLC,

22 Counter-claimant,

23 v.

24 MONARCH CONSULTING, INC. dba
PES PAYROLL,

25 Counter-defendant.
26
27
28

Pretrial Conference: December 8, 2014
Trial Date: December 16, 2014

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1 **TO THE COURT, AND TO PLAINTIFF AND COUNTER-DEFENDANT**
2 **MONARCH CONSULTING, INC. dba PES PAYROLL ("MONARCH") AND**
3 **ITS ATTORNEYS OF RECORD:**

4
5 Under F.R.C.P. 16 and Local Rule 16-4, Defendant and
6 Counterclaimant Specialty Risk Services, LLC ("SRS") submits this Memorandum
7 of Contentions of Fact and Law.

8
9 **I.**

10 **INTRODUCTION AND BACKGROUND**

11
12 **A. Operative Pleadings**

13 The operative pleadings in this case are:

- 14 a. Monarch's Complaint, filed on March 1, 2011 (ECF Doc. 1).
15 b. SRS' Answer, filed on June 6, 2011 (ECF Doc. 13).
16 c. SRS' Counterclaim, filed on June 6, 2011 (ECF Doc. 13).
17 d. Monarch's Answer to SRS' Counterclaim, filed on
18 June 27, 2011 (ECF Doc. 18).

19
20 **B. Summary of the Case**

21 From 2003 through 2010, Monarch obtained workers' compensation
22 insurance from AIG-related companies under a series of "large deductible" policies
23 (collectively, the "Policies") that set forth the terms of Monarch's workers'
24 compensation insurance program. The Policies required Monarch to reimburse
25 losses paid and expenses incurred on claims, up to the applicable deductible amount.

26
27 In 2005, Monarch selected SRS to serve as the Third-Party
28 Administrator ("TPA") to administer its workers' compensation claims under the

1 Policies. To that end, Monarch entered into its first Claim Service and Funding
2 Agreement ("CSA") with SRS effective October 21, 2005 through October 21, 2006
3 (the "2005 CSA"). In addition to the CSA, Monarch and SRS entered into a
4 "Performance Guarantee" agreement effective October 21, 2005 through
5 October 21, 2006 (the "2005 Performance Guarantee").

6
7 In October 2006, Monarch entered into a second CSA with SRS,
8 effective October 21, 2006 through October 21, 2007. In 2008, Monarch and SRS
9 negotiated an "Amendment No. 1" (the "Amendment") to the 2006-2007 CSA,
10 incorporating the 2006 CSA by reference and describing certain additional and/or
11 amended terms. The Amendment stated that the 2006 CSA remained in effect
12 between October 21, 2007 and October 21, 2009.¹

13
14 The parties dispute the terms of their agreement from October 21, 2009
15 through October 21, 2010. SRS contends that Monarch renewed its program under
16 the same terms, with the exception of certain amendments clarified in the Sold Fees
17 letter sent from SRS Account Manager Cheryl Vanden Heuvel to Monarch's former
18 CFO, Scott Bowen, on January 5, 2010. Monarch alleges that, After October 21,
19 2009, the parties entered into an *Oral* Agreement to renew the CSA for another year
20 with certain amended terms. The parties did not enter into any other oral or written
21 agreements. SRS continues to administer open claims that Monarch's workers filed
22 between 2005 and 2010.

23
24
25
26 ¹ SRS' account manager testified at deposition that she recalled Monarch executing
27 the 2007 Amendment. To date, the parties have been unable to locate a fully
28 executed copy of the Amendment. Monarch, however, pleads in its Complaint that
the 2007 Renewal Amendment contained the operative terms of the agreement
between the parties for the term beginning on October 21, 2007.

1 Under each CSA, SRS agreed to perform certain TPA administrative
2 services on Monarch's workers' compensation claims, and in return, Monarch agreed
3 to pay SRS certain amounts, including deposit service fees, administration fees and
4 service charges. SRS also entered into separate annual Claim Service Agreements
5 with AIG, which set forth certain terms applicable to SRS' handling of Monarch's
6 claims

7
8 From 2005 through approximately 2007, AIG billed Monarch in order
9 to obtain reimbursement for the losses and expenses, within the applicable
10 deductible amounts, on claims submitted under the Policies (the "Carrier Bill"
11 arrangement). In 2007, AIG requested that SRS send its invoices directly to
12 Monarch (the "Direct Bill" arrangement). The Direct Bill arrangement was
13 confirmed in the Amendment, which described changes to the CSA for the October
14 2007 through October 2009 time period.

15
16 Due to an oversight, the implementation of the Direct Bill arrangement
17 was delayed.² Although Monarch was fully aware of the claims losses that
18 continued to be paid and expenses that continued to be incurred, it never disclosed
19 to AIG or SRS that bills were not being received. Eventually, in addition to the
20 claim services fees that SRS billed Monarch under the CSAs, SRS began invoicing
21 for the losses and expenses paid on Monarch's workers' claims pursuant to the Direct
22 Bill arrangement. Once SRS began invoicing Monarch under the Direct Bill
23 arrangement, a catch up invoice issued that included the prior months that had not
24 been billed. In June/July of 2009, Cheryl Vanden Heuval, SRS' account manager,

25
26 _____
27 ² For a number of months at the outset of the Direct Billing arrangement, invoices
28 were not provided to Monarch. The error was identified and complete invoices,
with back-up documentation, were provided to Monarch.

1 met with Monarch to discuss the outstanding bills and worked out a payment plan.
2 Subsequently, SRS received a check from Monarch in the amount of \$50,000.

3
4 Instead of paying the remaining amounts owed, as it represented it
5 would, Monarch delayed and made excuses. Monarch made a few payments on
6 current invoices in September, October and November of 2009, but claimed that it
7 believed the amounts reflected on SRS' catch up invoices had already been billed by
8 and paid to AIG. When that turned out to be untrue, Monarch claimed that SRS
9 mishandled its claim files resulting in overpayments. Monarch's refusal to pay SRS'
10 invoices was a material breach of the CSAs. Based upon Monarch's breach, SRS
11 issued written notice to Monarch that SRS was terminating its services under the
12 CSAs. After the letter of termination, other than a few additional payments in May
13 of 2010, Monarch has failed and refused to pay the amounts due for unpaid service
14 fees and outstanding claim losses and expenses.

15
16 Presently, Monarch owes SRS in excess of **\$1.1 million** in service fees
17 and claims losses and expenses, and owes nearly \$3 million overall.

18 19 II.

20 CLAIMS AND DEFENSES

21 [L.R. 16-4.1]

22 23 a. L.R. 16-4.1(a): Summary Statement of the Claims Monarch 24 Has Pleaded and Plans to Pursue

Monarch's remaining causes of action include: (1) breach of contract;
(2) violation of California's Unfair Competition Law ("UCL"); and (3) Accounting.³

Claim 1: SRS Breached its Contract with Monarch

Monarch contends that SRS breached the parties' CSAs and the purported oral agreement by, among other things, "mishandling claims made under the agreements, over-reserving claims made under the Policies, over paying on claims made under the Policies, failing to reasonably and timely investigate claims made under the Policies, failing to provide adequate legal counsel for purposes of defending Monarch against the claims, and failing to communicate with Monarch before settling claims."

Claim 2: SRS Engaged in Unfair Business Practices in Violation of Business & Professions Code Sections 17200 *Et. Seq.*

Monarch contends that SRS engaged in "unlawful, unfair and/or deceptive business practice" relating to SRS' fees for bill review services which are clearly contained in the CSAs negotiated by the parties.

Claim 3: SRS Owes Monarch an Accounting

Monarch contends that SRS is "legally obligated" to account to Monarch by providing the requested documentation relating to the workers' compensation claims SRS handled.

b. L.R. 16-4.1(b): The Elements Required to Establish Monarch's Claims

³ Monarch voluntarily dismissed its claim for Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing (ECF Doc. 39), and the Court granted summary judgment on Monarch's claim for Declaratory Relief (ECF Doc. 73).

1 **Claim 1: Breach of Contract**

2 To prevail on its breach of contract claim, Monarch must prove that:

3 (1) SRS and Monarch entered into written or oral agreements; (2) Monarch did all,
4 or substantially all, of the significant things that the contracts required Monarch to
5 do, or that Monarch was excused from doing those things; (3) all conditions required
6 by the contracts for SRS' performance had occurred or were excused; (4) SRS failed
7 to do something that the contracts required it to do; and (5) Monarch was harmed by
8 that failure. Judicial Council of California Civil Jury Instructions ("CACI") 303;
9 Reichert v. General Insurance Co., 68 Cal.2d 822, 830, 69 Cal. Rptr. 321, 325
10 (1968).

11
12 **Claim 2: Unfair Business Practices**

13 To prevail on its Unfair Competition Law counterclaim, Monarch must
14 prove that: (1) it has suffered an injury in fact and has lost money or property as a
15 result of unfair business practices by SRS; and (2) SRS has engaged or proposes to
16 engage in "unfair competition," meaning an unlawful, unfair or fraudulent business
17 act or practice. Cal. Bus. & Prof. Code § 17200.

18
19 **Claim 3: Accounting**

20 An accounting claim for relief requires pleading and proof of facts
21 showing that "the nature of the relationship requires an accounting and that some
22 balance is due the plaintiff." Stilwell v. Trutanich, 178 Cal.App.2d 614, 620 (1960).
23 California courts have interpreted this requirement to mean that an accounting claim
24 for relief is appropriate only when a fiduciary relationship exists between
25 contracting parties, or where the "accounts are so complicated that an ordinary legal
26 action demanding a fixed sum is impracticable." Civic Western Corp. v. Zila
27 Industries, Inc., 66 Cal.App.3d 1, 14 (1977).
28

1 California courts limit accounting relief to claims by parties to a
 2 fiduciary or other close relationship, such as parties to a profit-sharing agreement.
 3 McLain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 806-07 (2008); see also Wolf
 4 v. Superior Court, 107 Cal.App.4th 25, 34-35 (2003) (reaffirming the long-standing
 5 principle that "a party to a profit-sharing agreement may have a right to an
 6 accounting . . . when such a right is inherent in the nature of the contract itself.").

7
 8 **c. L.R. 16-4.1(c): Key Evidence SRS Will use in Opposition to**
 9 **Monarch's Claims**

10
 11 **Claim 1: Key Evidence SRS will use in Opposition to Monarch's**
 12 **Breach of Contract Claim**

13 Monarch must prove the elements identified below:

14
 15 **Element (1):** SRS and Monarch entered into a contract.

16
 17 **SRS' evidence in opposition:** SRS will show through documents and
 18 testimony that, from October 21, 2005 through October 21, 2007, Monarch and SRS
 19 entered into signed and executed CSAs that contained unambiguous terms, which
 20 were subject to an enforceable integration clause. SRS also provided Monarch with
 21 a Performance Guarantee for the 2005-2006 year relating to its handling of
 22 Monarch's claims.

23
 24 In 2008, the parties negotiated "Amendment No. 1" to the CSAs, which
 25 incorporated the 2006 CSA by reference and described certain additional and/or
 26 amended terms for the period from October 21, 2007 through October 21, 2009.
 27 The Amendment stated that the 2006 CSA remained in effect between October 21,
 28 2007 and October 21, 2009.

1 The parties dispute the terms of their agreement from October 21, 2009
2 through October 21, 2010. SRS contends that Monarch renewed its program under
3 the same terms, with the exception of certain amendments clarified in the Sold Fees
4 letter sent from SRS Account Manager Cheryl Vanden Heuvel to Monarch's former
5 CFO, Scott Bowen, on January 5, 2010. Monarch alleges that, after October 21,
6 2009, the parties entered into an *Oral* Agreement to renew the CSA for another year
7 with certain amended terms. The parties did not enter into any other oral or written
8 agreements.

9
10 **Element (2):** Monarch did all, or substantially all, of the significant
11 things that the contract required Monarch to do, or that Monarch was excused from
12 doing those things.

13
14 **SRS' evidence in opposition:** SRS will show through documents and
15 testimony that it sent Monarch invoices reflecting the amounts due under the CSAs
16 and all written and/or oral amendments thereto (as described above), and sent
17 Monarch loss and expense invoices to obtain payments of amounts due for losses
18 paid and expenses incurred under the Policies. Monarch did not do what the
19 contracts required Monarch to do. Namely, Monarch failed and refused, and
20 continues to fail and refuse, to pay all amounts due under the invoices. Monarch
21 also failed to timely raise any claims of mishandling or overpayment, as required by
22 the parties' agreements.

23
24 **Element (3):** All conditions required by the contract for SRS'
25 performance had occurred or were excused.

1 **SRS' evidence in opposition:** SRS will show through documents and
2 testimony that it had no duty to perform under the contracts once Monarch stopped
3 paying SRS' invoices.

4
5 **Element (4):** SRS failed to do something that the contract required it
6 to do.

7
8 **SRS' evidence in opposition:** SRS will show, through documents and
9 percipient and expert witness testimony, including the agreements and
10 correspondence relating thereto, that it complied with its express and implied
11 contractual obligations when handling the workers' compensation claims submitted
12 by Monarch's injured workers.

13
14 Nonetheless, Monarch's Complaint alleges that SRS mishandled 47 of
15 its 374 workers' compensation claims.

16
17 The parties have had their respective experts review all 47 claims.
18 Monarch's experts' reports follow a familiar pattern of finding exorbitant damages
19 based on mischaracterizations of law, fact, or both. SRS' expert concluded that
20 Monarch's experts have over-reached to a ridiculous extreme. SRS will rely on its
21 expert's reports to make the following points:

22
23 First, Monarch's experts ignore facts and documents, and repeatedly
24 indulge in assumption and speculation that borders on fantasy – using qualifying
25 phrases such as "potentially" and "assuming." Often, Monarch's experts' reports
26 specifically *contradict* facts contained in Monarch's own internal claim files.

1 Second, while SRS' expert found some minor mistakes and/or
2 inadvertent overpayments in a few of the claim files, those errors had nowhere near
3 the enormous, unsupported financial impact claimed by Monarch's experts.
4

5 Third, Monarch's expert blames SRS for mishandling claims while
6 failing to even acknowledge that Monarch self-administered claims in violation of
7 California workers' compensation law – in some instances, not reporting injuries for
8 weeks or months after they had occurred, despite its obligation to do so. In certain
9 cases, Monarch only reported the claims after significant medical treatment had
10 been rendered and it was clear that Monarch's investigator and its Risk Manager
11 were not going to be successful at bullying the injured worker into dropping his/her
12 claim. In a few instances, to Monarch's dismay, SRS learned of a claim's existence
13 from the physician rendering treatment to the injured worker. Worse yet, when
14 Monarch did report the claim, it failed to provide SRS with information that was
15 relevant to determining the injured worker's benefits. Monarch's late reporting, self-
16 administration of claims and failure to provide necessary information breached
17 Monarch's obligations under the CSAs and California law.
18

19 Fourth, each of the At-Issue Claims was an admitted injury, meaning
20 Monarch acknowledged that a work-related accident occurred involving its
21 employee. Once Monarch concedes that an admitted injury has occurred (one that
22 arises out of and occurs in the course of employment – AOE/COE), the only
23 remaining issue is to determine the injury's nature and extent, and payment of
24 benefits due. Instead of acknowledging that all the At-Issue Claims were admitted
25 injuries, however, Monarch's experts inaccurately suggest that some of the injuries
26 could have been wished away, or meaningfully reduced in severity, by faster or
27 better investigation, a different handling of the medical treatment process or by
28 blaming a third party. Monarch's experts are dead wrong.

1 Fifth, Monarch's experts' opinions ignore Monarch's inextricable
2 involvement in the handling of its claims. Even worse, Monarch's experts attempt to
3 hold SRS responsible for actions that it did not take, and some actions of which SRS
4 was not even aware, until they were a *fait accompli*. Many of Monarch's experts'
5 criticisms are directed at decisions that Monarch's Risk Manager made or directions
6 that Monarch's Risk Manager gave with respect to the handling or resolution of
7 particular claims. It is undisputed that Monarch has continuous access to
8 information regarding its claims via SRS' on-line claims system, "@venture," which
9 Monarch's Risk Manager utilizes to keep track of claims and claim payments. SRS'
10 adjusters also dutifully notify Monarch when reserves or settlements exceed certain
11 thresholds. Monarch, in many cases, dictated how it wanted claims handled –
12 including, for example, challenging injured Hispanic employees' legal alien status if
13 they filed a claim, assigning its own investigator to try and discredit injured workers
14 and instructing defense counsel to undertake certain tasks, including settling claims,
15 without consulting the claims handler.

16
17 Sixth, Monarch insisted on using a defense attorney, Michael Mazurek,
18 who sent unprofessional correspondence that attacked the injured workers'
19 attorneys, doctors rendering medical care, Social Security Administration employees
20 and, at times, the adjusters handling the claims. Aside from being unprofessional,
21 Mr. Mazurek's tirades contain inaccurate facts and incorrect law and adversely
22 impacted the outcome of certain claims. Even Monarch's expert was forced to
23 concede at his deposition that Mr. Mazurek's behavior was unprofessional and
24 detrimental to at least one claim (Estrada). Monarch concedes that SRS advised it
25 of Mr. Mazurek's antics, yet Monarch still required that he be assigned to defend its
26 claims.

1 Monarch's experts' reports repeatedly cite conduct engaged in by Mr.
 2 Mazurek (sometimes with the blessing of Monarch's Risk Manager, Aldo
 3 Cammarota) as causing damage or, as they refer to it, "leakage" in the claim files.
 4 For example, Monarch's experts' reports often challenge the settlement of claims.
 5 Monarch was not only aware of many of the settlements that its experts now claim
 6 were overpaid, but Mr. Cammarota was often the person authorizing defense
 7 counsel to settle those claims *without even discussing the settlement with the SRS*
 8 *personnel handling the file.*

9
 10 On some claims, in contravention to the parties' agreements, Monarch
 11 negotiated settlements directly with the attorney without even *involving* the claims
 12 adjuster. Despite Monarch's blatant violations and breach of the CSAs, its expert
 13 now challenges the settlements on those claims. Monarch hand selected and
 14 directed defense counsel on those claims. Its expert repeatedly second-guesses and
 15 criticizes conduct, recommendations and decisions made by defense counsel, even
 16 though that defense counsel was carrying out *Monarch's* directives and instructions,
 17 and *blames SRS for the purported "damages" as a result of such conduct.*

18
 19 Finally, Monarch has made other factual and legal misrepresentations
 20 throughout this action. For example, the CSAs specifically provide that Monarch
 21 opted/elected and agreed to pay Medical Bill Repricing ("MBR") at 27% of the
 22 difference between the billed charges and the actual amount paid on each bill
 23 (sometimes referred to as "27% of savings"). Despite a contract between the parties
 24 which clearly confirms and spells out the MBR procedure, Monarch's experts allege
 25 that SRS' MBR fees are excessive and resulted in damages to Monarch – even
 26 though they were calculated in conformance with the CSAs.⁴ Monarch instructed its

27
 28 ⁴ SRS has filed a Motion *in Limine* to preclude Monarch from introducing any
 evidence that some "other" MBR option was advertised and/or agreed to.

1 expert to "assume" that MBR should have been calculated on a "per bill" basis,
2 which differs entirely from the "percentage of savings" method agreed to by the
3 parties in the CSAs. In other words, Monarch's experts again apply the wrong
4 standard in evaluating SRS' conduct.

5
6 A possible explanation for why Monarch's experts' reports miss the
7 mark so badly may be that Monarch instructed its experts to "audit" the claim files
8 applying the ***wrong standard***. Instead of applying the contractual standard agreed to
9 by the parties, Monarch's experts conclude that SRS mishandled the claims because
10 SRS' conduct did not comport with "Best Practices." Monarch's experts' reliance on
11 "Best Practices" is, at best, misplaced. As Monarch well knows, "Best Practices"
12 are instituted by a company in order to set goals for its staff to meet. They are not,
13 and have never been, the standard against which claims handling should be judged
14 to determine whether there has been a breach of the CSAs. The CSAs define the
15 standards applicable to SRS' handling of Monarch's claims – nowhere in the CSAs
16 are "Best Practices" even mentioned. The CSAs provide that claims are to be
17 handled "in accordance with ***accepted practices and applicable state law governing***
18 ***claims practices***." More importantly, Monarch's experts were told by Monarch's
19 counsel to rely on the "Best Practices" he provided. The "Best Practices" provided
20 and relied upon by Monarch's expert were published in December of 2009, years
21 after the majority of the allegedly "damaging" conduct occurred.

22
23 In short, Monarch's experts' revisionist history, over-reaching, rank
24 speculation and ill-founded assumptions are inconsistent with the actual facts of the
25 claim files and demonstrate a complete lack of credibility. The reports, which have
26 no basis in fact and routinely mis-cite or misapply the law, appear designed for the
27 sole purpose of supporting Monarch's unfounded attempt to avoid paying SRS (and
28 the insurance carrier) the millions of dollars it owes.

1 SRS will also rely on documents and testimony to show that Monarch
 2 knew about the 27% MBR charge and did not challenge its enforceability until it
 3 became dissatisfied with the amounts it was being charged. SRS did *exactly* what
 4 the contracts required it to do – handle Monarch's claim and bill it for services
 5 rendered. It could not have breached the parties' CSAs by simply billing Monarch
 6 *for a cost it explicitly agreed to pay*.

7
 8 Finally, SRS will show through documents and testimony that it did not
 9 breach the CSAs by terminating its agreement with Monarch, because Monarch's
 10 nonpayment of amounts owed constituted an affirmative breach by *Monarch*.

11
 12 **Element (5):** Monarch was harmed by that failure.

13
 14 **SRS' evidence in opposition:** SRS will show, through percipient and
 15 expert witness testimony and documents, including evidence from Monarch's own
 16 experts, that Monarch did not suffer any monetary damages as a result of SRS'
 17 claims handling. The reason is simple -- even accepting *all* of Monarch's expert's
 18 claims handling criticisms as true, Monarch would *still* be in arrears for over \$1
 19 million. The only party that can possibly recover compensatory damages in this
 20 case is SRS. The question is simply how much.

21
 22 **Claim 2: Key Evidence SRS will use in Opposition to Monarch's**
 23 **UCL Claim**

24 Monarch must prove the elements identified below.

25
 26 **Element (1):** Monarch has suffered an injury in fact and has lost
 27 money or property as a result of unfair business practices by SRS.

1 **SRS' evidence in opposition:** SRS will show, through percipient and
2 expert witness testimony and documents, including evidence from Monarch's own
3 experts, that Monarch has not lost money or property as a result of SRS' claims
4 handling.

5
6 In its first UCL claim, Monarch contends that SRS' claims handling
7 resulted in artificial increases in the collateral and premium obligations that *it owes*
8 *to AIG*. Monarch's allegations establish that AIG, not SRS, purportedly benefitted –
9 through the possibility of higher premiums and collateral requirements – from SRS'
10 alleged mishandling. Monarch's allegations concede that any payments were made
11 to AIG. Monarch's admission that AIG, not SRS, received the alleged illicit profits
12 from SRS' misconduct confirms that Monarch has not suffered an injury-in-fact for
13 which it can recover against SRS.

14
15 In addition, Monarch did not suffer any damages as a result of SRS'
16 claims handling. The reason is simple – even accepting *all* of Monarch's expert's
17 claims handling criticisms as true, Monarch would *still* be in arrears for over \$1
18 million. The only party that can possibly recover compensatory damages in this
19 case is SRS. The question is simply how much.

20
21 In its second UCL claim, Monarch alleges that it was overcharged for
22 bill review fees. While it is true that Monarch was invoiced for medical bill review
23 expenses, in accordance with the CSAs, the undisputed evidence is that Monarch
24 *has not paid SRS* for the allegedly overbilled fees. Because it has not yet parted
25 with the amounts it seeks to recover, it has not made an *actual payment* of money,
26 has not suffered injury in fact, and lacks standing to pursue its UCL claim.

1 **Element (2):** SRS has engaged or proposes to engage in "unfair
2 competition," meaning an unlawful, unfair or fraudulent business act or practice.

3
4 **SRS' evidence in opposition:** SRS hereby incorporates its summary
5 of the evidence it will offer in opposition to Monarch's breach of contract claim,
6 described above. That same evidence also refutes Monarch's claim for an alleged
7 violation of the UCL.

8
9 **Claim 3: Key Evidence SRS will use in Opposition to Monarch's**
10 **Accounting Claim**

11 Monarch must prove that the nature of its relationship with SRS
12 requires SRS to provide it an accounting and that some balance is due Monarch.

13
14 **SRS' evidence in opposition:** SRS will show through documents and
15 testimony that it is not a fiduciary of Monarch, and that there is no other "special"
16 relationship that would justify an accounting. Monarch claims only that SRS
17 improperly invoiced it for certain fees and charges, and SRS denies those claims.
18 Monarch cannot meet its burden of demonstrating the existence of a relationship of
19 the sort that would justify an accounting claim.

20
21 **d. L.R. 16-4(d): Summary Statement of the Counterclaims and**
22 **Affirmative Defenses that SRS Has Pleaded and Intends to**
23 **Pursue**

24 SRS' Counterclaims and Affirmative Defenses are as follows:

25
26 **Counterclaim 1:** SRS contends that Monarch breached its contract
27 with SRS based on Monarch's failure to pay over \$1.1 million in service fees and
28 claims losses and expenses.

1 **Counterclaim 2:** SRS contends that within the past four years,
2 Monarch became indebted to SRS on an open account for money due for services
3 provided and for claims losses and expenses. Monarch has failed and refused and
4 continues to fail and refuse to pay any portion of the sums owed to SRS, although
5 demands have been made therefor.

6
7 **Counterclaim 3:** SRS contends that within the past four years,
8 Monarch became indebted to SRS for money paid by SRS for claims losses and
9 expenses paid by SRS to Monarch's injured employees at Monarch's request, and
10 with Monarch's consent and on Monarch's behalf. Monarch has failed and refused
11 and continues to fail and refuse to pay any portion of the sums owed to SRS,
12 although demands have been made therefor.

13
14 **Affirmative Defense 1:** Right to Offset

15 **Affirmative Defense 2:** Failure to Mitigate Damages

16 **Affirmative Defense 3:** Statute of Limitations

17 **Affirmative Defense 4:** Adequate Remedy at Law

18 **Affirmative Defense 5:** Waiver/Estoppel

19 **Affirmative Defense 6:** Late Notice

20 **Affirmative Defense 7:** Failure to Perform Contract Obligations

21 **Affirmative Defense 8:** Proximate Cause by Monarch

22 **Affirmative Defense 9:** Punitive Damages – Failure to State a Claim

23 **Affirmative Defense 10:** Punitive Damages – Procedural Due Process

24 **Affirmative Defense 11:** Punitive Damages –Protection From

25 Excessive Fines

26 **Affirmative Defense 12:** Punitive Damages – No Ratification

1 e. **L.R. 16-4.1(e). The Elements Required to Establish SRS'**
2 **Counterclaims and Affirmative Defenses**

3
4 **Counterclaim 1: Breach of Contract. Elements Required to**
5 **Establish SRS' Breach of Contract Counterclaim**

6
7 To prevail on its breach of contract claim, SRS must prove that:

8 (1) SRS and Monarch entered into a contract; (2) SRS did all, or substantially all, of
9 the significant things that the contract required SRS to do, or that SRS was excused
10 from doing those things; (3) all conditions required by the contract for Monarch's
11 performance had occurred or were excused; (4) Monarch failed to do something that
12 the contract required it to do; and (5) SRS was harmed by that failure. CACI 303;
13 Reichert v. General Ins. Co., 68 Cal.2d 822, 830, 69 Cal. Rptr. 321, 325 (1968).

14
15 **Counterclaim 2: Money Due on Open Account. Elements Required**
16 **to Establish SRS' Counterclaim For Open Book Account**

17
18 To prevail on its claim for money due on open account, SRS must
19 prove that: (1) Monarch and SRS had financial transactions; (2) SRS kept an
20 account of the debits and credits involved in the transaction(s); (3) that Monarch
21 owes SRS money on the account; and (4) the amount of money that Monarch owes
22 SRS. CACI 372; see Farmers Ins. Exch. v. Zerin, 53 Cal.App.4th 445, 460 (1997).

23
24 **Counterclaim 3: Money Paid. Elements Required to Establish**
25 **SRS' Counterclaim for Money Paid**

26
27 To prevail on its counterclaim for Money Paid (Goods and Services
28 Rendered), SRS must prove that: (1) Monarch requested, by words or conduct, that

1 SRS perform services for the benefit of Monarch; (2) that SRS performed the
 2 services as requested; (3) that Monarch has not paid SRS for the services; and
 3 (4) the reasonable value of the services that were provided. CACI 372; see Title Ins.
 4 Co. v. State Bd. of Equalization, 4 Cal.4th 715, 731 (1992).

5
 6 **Affirmative Defense 1: Right to Offset. Elements Required to**
 7 **Establish SRS' Affirmative Defense of Set-Off**

8
 9 In order to establish its affirmative defense of set-off, SRS must prove
 10 that (1) Monarch owes SRS money, and (2) the amount. If SRS meets that burden,
 11 the amount proven may be set-off against any amounts that SRS owes to Monarch.
 12 Cal. Code Civ. Proc. § 431.70.

13
 14 **Affirmative Defense 2: Failure to Mitigate. Elements Required to**
 15 **Establish SRS' Affirmative Defense of Failure to Mitigate**

16
 17 In order to establish that Monarch failed to mitigate damages, SRS
 18 must establish that the damage suffered by Monarch could have been avoided with
 19 reasonable efforts or expenditures. CACI 358.

20
 21 **Affirmative Defense 3: Statute of Limitations. Elements Required**
 22 **to Establish SRS' Affirmative Defense of Statue of Limitations**

23
 24 To prevail on an affirmative defense of statute of limitations, SRS must
 25 prove that Monarch's lawsuit was not filed within the time set by law. To succeed
 26 on this defense, SRS must prove that Monarch's claimed harm relating to any
 27 written contract occurred before March 1, 2007, and that Monarch's claimed harm
 28

1 relating to any oral contract occurred before March 1, 2009. CACI 338; Cal. Code
2 Civ. Proc. §§ 337, 339.

3
4 **Affirmative Defense 4: Adequate Remedy at Law. Elements**
5 **Required to Establish SRS' Affirmative Defense of Adequate**
6 **Remedy at Law**

7
8 SRS asserted this legal defense so that it can demonstrate that Monarch
9 is not entitled to any injunctive relief, because any harm it suffered as a result of any
10 purported claims mishandling may be remedied by the payment of money, rendering
11 injunctive relief unnecessary.

12
13 **Affirmative Defense 5: Waiver/Estoppel. Elements required to**
14 **establish SRS' Affirmative Defense of Waiver/Estoppel**

15
16 The elements of waiver require SRS to prove that: (1) Monarch knew
17 it was required to challenge SRS' invoices within ninety (90) days, and (2) Monarch
18 knowingly gave up its right to challenge those invoices. A waiver may be oral or
19 written or may arise from conduct that shows that Monarch gave up its right to
20 challenge the invoices. CACI 336.

21
22 **Affirmative Defense 6: Late Notice. Elements Required to**
23 **Establish SRS' Affirmative Defense of Late Notice**

24
25 SRS asserted this legal defense so that it can demonstrate that Monarch
26 is not entitled to challenge any amounts owed on bills which it did not challenge
27 within the ninety (90) day limit outlined in the parties' agreements.

Affirmative Defense 7: Failure to Perform Contract Obligations.
Elements Required to Establish SRS' Affirmative Defense of
Failure to Perform Contract Obligations

To prevail on its affirmative defense of failure to perform contract obligations, or its affirmative claim for relief for breach of contract, SRS must prove that: (1) SRS and Monarch entered into a contract; (2) SRS did all, or substantially all, of the significant things that the contract required SRS to do, or that SRS was excused from doing those things; (3) all conditions required by the contract for Monarch's performance had occurred or were excused; (4) Monarch failed to do something that the contract required it to do; and (5) SRS was harmed by that failure. CACI 303; Reichert v. General Insurance Co., 68 Cal.2d 822, 830, 69 Cal. Rptr. 321, 325 (1968).

Affirmative Defense 8: Proximate Cause by Monarch. Elements
Required to Establish SRS' Affirmative Defense of Proximate
Cause by Monarch

SRS asserted this legal defense so that it can demonstrate that Monarch's actions were the proximate cause of any purported damage suffered by Monarch.

Affirmative Defenses 9-12: No Punitive Damages. Elements
Required to Establish SRS' Affirmative Defenses re Punitive
Damages

SRS asserted these legal defenses in order to challenge Monarch's factual and legal entitlement to recover punitive damages. Monarch bears the

1 burden of establishing its factual entitlement, if any, to punitive damages. SRS will
2 challenge any showing on the facts, and in addition, shall demonstrate that punitive
3 damages are improper as a matter of law.

4
5 These affirmative defenses are mooted by the Court's Order entering
6 the parties' Stipulation to dismiss the second cause of action for breach of the
7 implied covenant of good faith and fair dealing. (ECF Doc. 39). Monarch does not
8 seek punitive damages under any remaining claim.

9
10 **f. L.R. 16-4.1(f): Key Evidence in Support of SRS'**
11 **Counterclaims and Affirmative Defenses.**

12
13 **1. Key Evidence SRS Will Rely on In Support of its Breach of**
14 **Contract Claim.**

15 SRS must prove the elements identified below.

16
17 **Element (1):** SRS and Monarch entered into a contract.

18
19 **SRS' evidence in support:** SRS will rely on the signed CSAs from
20 2005 and 2006, the First Amendment to the 2006 CSA and correspondence
21 evidencing the understanding that the 2006 CSA remained in effect, and the Oral
22 Agreement from 2009 evidencing the understanding that the contract terms
23 remained the same, as well as other testimony and documents establishing the
24 parties' agreements.

25
26 **Element (2):** SRS did all, or substantially all, of the significant things
27 that the contracts required SRS to do, or that SRS was excused from doing those
28 things.

1 **SRS' evidence in support:** SRS will show through testimony and
2 documents that it provided all services required of it under the parties' agreements,
3 or was excused from doing so because Monarch breached the agreements when it
4 stopped paying SRS' outstanding invoices.

5
6 **Element (3):** All conditions required by the contract for Monarch's
7 performance had occurred or were excused.

8
9 **SRS' evidence in support:** SRS will rely on the agreements' terms and
10 other testimony and documents to show that all conditions required by the contract
11 for Monarch's performance had been met.

12
13 **Element (4):** Monarch failed to do something that the contract
14 required it to do.

15
16 **SRS' evidence in support:** SRS will rely on the agreements' terms and
17 other testimony and documents to show that SRS duly performed its obligations,
18 except to the extent that they were prevented or excused by Monarch. Among other
19 things, SRS properly administered and paid claims for benefits submitted by
20 Monarch's employees under the Policies.

21
22 SRS provided Monarch with comprehensive invoices detailing the amounts
23 due under the Claims Service Agreements and the amounts due for losses paid and
24 expenses incurred under the Policies.

25
26 Monarch breached the Claims Service Agreements and its obligations
27 by failing and refusing to pay the amounts due and owing. As a direct and
28 proximate result of Monarch's conduct, SRS is owed in excess of \$1.2 million.

1 **2. Key Evidence SRS Will Rely on In Support of its Common Claims**
 2 **for Money Due and Money Paid.**

3 SRS will show through testimony and documents that it provided all
 4 services required of it under the parties' agreements, or was excused from doing so
 5 because Monarch breached the agreements when it stopped paying SRS' outstanding
 6 invoices. SRS will show that it handled Monarch's workers' compensation claims in
 7 accordance with the parties' agreements, and performed all other services that
 8 Monarch requested in the agreements, and that Monarch now owes SRS in excess of
 9 \$1.2 million. This amount includes monies paid by SRS for losses and expenses
 10 paid on Monarch's workers' claims pursuant to the Direct Bill arrangement.

11
 12 **g. L.R. 16-4.1(g): Other Claims** [Monarch's Affirmative
 13 Defenses to SRS' Counterclaims]

14 (1) Monarch asserted the following affirmative defenses to
 15 SRS' counterclaims:

16
 17 **Affirmative Defense 1:** Failure to State a Cause of Action

18 **Affirmative Defense 2:** Ratification and Consent

19 **Affirmative Defense 3:** Apportionment

20 **Affirmative Defense 4:** Negligent Performance

21 **Affirmative Defense 5:** Waiver

22 **Affirmative Defense 6:** Equitable Estoppel/ Promissory Estoppel

23 **Affirmative Defense 7:** Estoppel

24 **Affirmative Defense 8:** Justification

25 **Affirmative Defense 9:** Good Faith Assertion of Legal Right

26 **Affirmative Defense 10:** SRS has Sustained No Damage

27
 28 **Affirmative Defense 11:** Speculative Damages

Affirmative Defense 12: Offset
Affirmative Defense 13: Statute of Limitations
Affirmative Defense 14: Laches
Affirmative Defense 15: Unclean Hands
Affirmative Defense 16: Failure to Provide Notice to Cure
Affirmative Defense 17: Excused Performance
Affirmative Defense 18: Allegations are Immaterial
Affirmative Defense 19: PES's Performance
Affirmative Defense 20: PES's Claim for Money
Affirmative Defense 21: Additional Affirmative Defense
Affirmative Defense 22: Unjust Enrichment
Affirmative Defense 23: Incorporation of Complaint Allegations

(2) Elements Required to Establish Monarch's Affirmative Defenses to SRS' Counterclaims

Affirmative Defense 1: Elements Required to Establish Monarch's Affirmative Defense of Failure to State a Cause of Action

This is not a viable affirmative defense. "The defense of failure to state a cause of action presents nothing to try. No evidence is admissible, no witnesses may testify. The defense is resolved by the court on the complaint." Schwing, A.T., California Affirmative Defenses § 9.4, p. 518 (West, 2011).

Affirmative Defense 2: Elements Required to Establish Monarch's Purported Affirmative Defense of "Ratification and Consent"

"Ratification and Consent" is not a valid affirmative defense to a breach of contract claim. To the extent that Monarch may contend that "ratification and consent" is a form of "waiver," the elements of waiver require Monarch to prove, by

1 clear and convincing evidence, that: (1) SRS knew Monarch was required to pay
 2 SRS' invoices, and (2) SRS freely and knowingly gave up its right to have Monarch
 3 pay its invoices. A waiver may be oral or written or may arise from conduct that
 4 shows that SRS gave up its right to payment. CACI 336.

5
 6 **Affirmative Defense 3: Elements Required to Establish Monarch's**
 7 **Purported Affirmative Defense of "Apportionment"**

8 "Apportionment" is not a valid affirmative defense. To the extent that
 9 Monarch means to contend that SRS was damaged as a result of its own negligence,
 10 it must prove that (1) SRS was negligent, and (2) SRS' negligence was a substantial
 11 factor in causing SRS' harm. If Monarch proves both of these elements, then SRS'
 12 damages are reduced by the court's determination of the percentage of SRS'
 13 responsibility. CACI 405.

14
 15 **Affirmative Defense 4: Elements Required to Establish Monarch's**
 16 **Purported Affirmative Defense of "Negligent Performance"**

17 Negligence is not a valid affirmative defense to SRS' breach of contract
 18 claim. Before asserting this affirmative defense, Monarch must establish, as a
 19 matter of law, that negligence is a valid and authorized defense to SRS' breach of
 20 contract claim.

21
 22 If Monarch is entitled to raise negligence by SRS as an affirmative
 23 defense, then, in order to prevail, it must prove that (1) SRS was negligent, and
 24 (2) SRS' negligence was a substantial factor in causing SRS' harm. If Monarch
 25 proves both of these elements, then SRS' damages are reduced by the jury's/court's
 26 determination of the percentage of SRS' responsibility. CACI 405.

Affirmative Defense 5: Elements Required to Establish Monarch's
Affirmative Defense of Waiver

To prevail on an affirmative defense of waiver, Monarch must prove, by clear and convincing evidence, that (1) SRS knew Monarch was required to pay SRS' invoices, and (2) SRS freely and knowingly gave up its right to have Monarch pay its invoices. A waiver may be oral or written, or may arise from conduct that shows that SRS gave up its right to payment. CACI 336.

Affirmative Defense 6: Elements Required to Establish Monarch's
Affirmative Defense of Equitable Estoppel/ Promissory Estoppel

Under the doctrine of estoppel, if a party, by statements or conduct, intentionally and deliberately caused another to believe a certain thing to be true and to act on that belief, then that party cannot contradict its statements or conduct. In order to establish the defense of equitable estoppel, Monarch must prove that: (1) SRS made a representation of fact by words or conduct intending that Monarch rely on it; (2) SRS knew the facts; (3) Monarch was ignorant of the true facts; and (4) Monarch reasonably relied on SRS' representation and was injured as a result. Cal. Evid. Code § 623; California Forms of Jury Instruction MB 300F.27, p. 3F-38 (Matthew Bender 2011); *see also* Schwing, A.T., California Affirmative Defenses § 34.10, p. 290 (West, 2011); *citing, inter alia*, Santoro v. Carbone, 22 Cal.App.3d 721, 730, 99 Cal. Rptr. 488, 494-95 (1972); *disapproved on other grounds*, Tenzer v. Superscope, Inc., 39 Cal.3d 18, 30; 216 Cal. Rptr. 130 (1985).

Affirmative Defense 7: Elements Required to Establish Monarch's
Affirmative Defense of Estoppel

Under the doctrine of estoppel, if a party, by statements or conduct, intentionally and deliberately caused another to believe a certain thing to be true and to act on that belief, then that party cannot contradict its statements or conduct. In

1 order to establish the defense of equitable estoppel, Monarch must prove that:
 2 (1) SRS made a representation of fact by words or conduct intending that Monarch
 3 rely on it; (2) SRS knew the facts; (3) Monarch was ignorant of the true facts; and
 4 (4) Monarch reasonably relied on SRS' representation and was injured as a result.
 5 Cal. Evid. Code § 623; California Forms of Jury Instruction MB 300F.27, p. 3F-38
 6 (Matthew Bender 2011); *see also* Schwing, A.T., California Affirmative Defenses
 7 § 34.10, p. 290 (West, 2011); *citing, inter alia*, Santoro v. Carbone, 22 Cal.App.3d
 8 721, 730, 99 Cal. Rptr. 488, 494-95 (1972); *disapproved on other grounds*, Tenzer
 9 v. Superscope, Inc., 39 Cal.3d 18, 30; 216 Cal. Rptr. 130 (1985).

10
 11 **Affirmative Defense 8: Elements Required to Establish Monarch's**
 12 **Purported Affirmative Defense of "Justification"**

13 "Justification" is not a valid affirmative defense to a breach of contract
 14 claim. To the extent that Monarch may contend that "justification" is a form of
 15 "waiver," the elements of waiver require Monarch to prove, by clear and convincing
 16 evidence, that: (1) SRS knew Monarch was required to pay SRS' invoices; and
 17 (2) SRS freely and knowingly gave up its right to have Monarch pay its invoices. A
 18 waiver may be oral or written or may arise from conduct that shows that SRS gave
 19 up its right to payment. CACI 336.

20
 21 **Affirmative Defense 9: Elements Required to Establish Monarch's**
 22 **Purported Affirmative Defense of "Good Faith Assertion of a**
 23 **Legal Right"**

24 "Good Faith Assertion of a Legal Right" is not a valid affirmative
 25 defense. It is SRS' burden, on its breach of contract claim, to establish that Monarch
 26 failed to perform its obligations under the contract. CACI 303.

Affirmative Defense 10: Elements Required to Establish

Monarch's Purported Affirmative Defense of "SRS has Sustained No Damage"

"No damages" is not an affirmative defense to SRS' breach of contract claim. Damages are an essential element to SRS' breach of contract claim.

Affirmative Defense 11: Elements Required to Establish

Monarch's Purported Affirmative Defense of "Speculative Damages"

"Speculative damages" is not an affirmative defense to SRS' breach of contract claim. Damages are an essential element to SRS' breach of contract claim.

Affirmative Defense 12: Elements Required to Establish

Monarch's Affirmative Defense of Offset

In order to establish its affirmative defense of set-off, Monarch must prove that (1) SRS owes Monarch money, and (2) the amount. If Monarch meets that burden, the amount proven may be set-off against amounts that Monarch owes to SRS. Cal. Code Civ. Proc. § 431.70.

Affirmative Defense 13: Elements Required to Establish

Monarch's Affirmative Defense of Statute of Limitations

In order to establish its affirmative defenses under statutes of limitations, Monarch must prove that SRS filed its counterclaims after expiration of applicable statutes of limitations, including, among others, four years for actions for breach of written contract and declaratory relief as to such a contract. Cal. Code Civ. Proc. § 337.

Affirmative Defense 14: Elements Required to Establish
Monarch's Affirmative Defense of Laches

To prevail on its laches defense, Monarch must prove that (1) SRS delayed the assertion of a right; (2) for some appreciable period; and (3) Monarch would be prejudiced if SRS' assertion of the right is permitted. Stafford v. Ballinger, 199 Cal.App.2d 289, 296 (1962).

Affirmative Defense 15: Elements Required to Establish
Monarch's Affirmative Defense of Unclean Hands

To prevail on its unclean hands defense, Monarch must prove that (1) SRS' conduct was unconscionable and resulted in prejudice to Monarch, and (2) SRS' misconduct was intimately connected with SRS' claims of breach of contract and of such a prejudicial nature that it would be unfair to allow SRS to recover for Monarch's breach of contract. California Forms of Jury Instruction MB 300F.29, p. 3F-43 (Matthew Bender 2011); *see also* Schwing, A.T., California Affirmative Defenses § 45:18, p. 1290 (West, 2011); *citing* Lynn v. Duckel, 46 Cal.2d 845, 850 (1956); Watson v. Poore, 18 Cal.2d 302, 313 (1941); Health Maintenance Network v. Blue Cross of So. Cal., 202 Cal.App.3d 1043, 1061, 249 Cal. Rptr. 220, 232 (1988); Seligman v. Tucker, 6 Cal.App.3d 691, 700, 86 Cal. Rptr. 187, 192-93 (1970); Fiberboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal.App.2d 675, 727-28, 39 Cal. Rptr. 64, 96-97 (1964); Moriarty v. Carlson, 184 Cal.App.2d 51, 56, 7 Cal. Rptr. 282, 284-85 (1960).

Affirmative Defense 16: Elements Required to Establish
Monarch's Purported Affirmative Defense of Failure to Provide Notice to Cure

"Failure to Provide Notice to Cure" is not a valid affirmative defense. To the extent that Monarch may contend "Failure to Provide Notice to Cure" is a

1 form of "unclean hands," Monarch must prove that (1) SRS' conduct was
 2 unconscionable and resulted in prejudice to Monarch, and (2) SRS' misconduct was
 3 intimately connected with SRS' claims of breach of contract and of such a
 4 prejudicial nature that it would be unfair to allow SRS to recover for Monarch's
 5 breach of contract. California Forms of Jury Instruction MB 300F.29, p. 3F-43
 6 (Matthew Bender 2011); *see also* Schwing, A.T., California Affirmative Defenses
 7 § 45:18, p. 1290 (West, 2011); *citing* Lynn v. Duckel, 46 Cal.2d 845, 850 (1956);
 8 Watson v. Poore, 18 Cal.2d 302, 313 (1941); Health Maintenance Network v. Blue
 9 Cross of So. Cal., 202 Cal.App.3d 1043, 1061, 249 Cal. Rptr. 220, 232 (1988);
 10 Seligman v. Tucker, 6 Cal.App.3d 691, 700, 86 Cal. Rptr. 187, 192-93 (1970);
 11 Fiberboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal.App.2d
 12 675, 727-28, 39 Cal. Rptr. 64, 96-97 (1964); Moriarty v. Carlson, 184 Cal.App.2d
 13 51, 56, 7 Cal. Rptr. 282, 284-85 (1960).

14
 15 **Affirmative Defense 17: Elements Required to Establish**
 16 **Monarch's Purported Affirmative Defense of Excused**
 17 **Performance**

18 "Performance excused" is not a valid affirmative defense to a breach of
 19 contract claim.

20
 21 **Affirmative Defense 18: Elements Required to Establish**
 22 **Monarch's Purported Affirmative Defense of "Allegations are**
 23 **Immaterial"**

24 "Allegations are Immaterial" is not a valid affirmative defense to a
 25 breach of contract claim.

Affirmative Defense 19: Elements Required to Establish
Monarch's Purported Affirmative Defense of "PES' Performance"

"PES' Performance" is not a valid affirmative defense to a breach of contract claim.

Affirmative Defense 20: Elements Required to Establish
Monarch's Purported Affirmative Defense of "PES' Claim for Money"

"PES' Claim for Money" is not a valid affirmative defense. To the extent Monarch may contend "PES' Claim for Money" is a form of "Offset," Monarch must prove that (1) SRS owes Monarch money, and (2) the amount. If Monarch meets that burden, the amount proven may be set-off against amounts that Monarch owes to SRS. Cal. Code Civ. Proc. § 431.70.

Affirmative Defense 21: Elements Required to Establish
Monarch's Purported Affirmative Defense of "Additional Affirmative Defense"

"Additional Affirmative Defense" is not a valid affirmative defense.

Affirmative Defense 22: Elements Required to Establish
Monarch's Affirmative Defense of Unjust Enrichment

"Unjust Enrichment" is not a valid affirmative defense, or even a cause of action, but rather "a general principle, underlying various legal doctrines and remedies." McBride v. Boughton, 123 Cal.App.4th 379, 387 (2004). To the extent Monarch may contend "Unjust Enrichment" is a form of "Offset," Monarch must prove that (1) SRS owes Monarch money, and (2) the amount. If Monarch meets that burden, the amount proven may be set-off against amounts that Monarch owes to SRS. Cal. Civ. Proc. Code § 431.70.

Affirmative Defense 23: Elements Required to Establish Monarch's Purported Affirmative Defense of "Incorporation of Complaint Allegations"

"Incorporation of Complaint Allegations" is not a valid affirmative defense.

(2) Summary of Key Evidence SRS Will Rely on in Opposition to Monarch's Affirmative Defenses

The key evidence SRS will rely upon to oppose Monarch's affirmative defenses to SRS' counterclaims is the same key evidence that supports SRS' opposition to Monarch's claims [L.R. 16-4.1(c), above] and its own affirmative counterclaims against Monarch [L.R. 16-4.1(f), above].

h. L.R. 16-4.1(h): Identification of Anticipated Issues Regarding Evidence, and SRS' Position as to Those Issues

1. Monarch's Burden of Proving Claims Mishandling. In this case, Monarch contends that SRS mishandled 47 workers' compensation claims. Each of those claims involves a separate claim file, containing separate and different factual and legal issues and disputes, including but not limited to different injuries, claims, investigations, medical issues, incurred losses, reserves, payments, claim adjusters, attorneys and underlying administrative law judges. As discussed below, SRS' position is that Monarch must prove its claims mishandling allegations for each and every separate claim file that it has put at issue. As a matter of due process and well-established law, Monarch is not entitled to extrapolate, from a demonstration of claims mishandling in one file or a "sample" of files, any conclusions about the handling of other files for which it has not submitted separate and sufficient evidence of claims mishandling.

1 **2. Preserving Confidentiality of Private Claims Information At**
2 **Trial.** The at-issue claim files were produced under a Protective Order, and SRS
3 has designated the files "confidential." In connection with the Parties' trial
4 preparation, and in preparing to offer claim file documents as evidence at trial, the
5 Parties need to develop a method for preserving the confidentiality of the claim files.

6
7 **3. Monarch's Failure to Provide Any Evidence of Damages.**
8 SRS will prove at trial that, even if Monarch's experts' claims mishandling criticisms
9 are 100% accurate, Monarch would *still* be in arrears for roughly \$1.1 million.
10 Monarch has no damages in this case because SRS' alleged breach did not cause
11 Monarch to suffer any economic loss. Monarch stopped paying SRS' invoices long
12 ago, and it has no evidence that it overpaid SRS by any amount.

13
14 **4. Monarch's Attempt to Introduce Evidence that Contradicts**
15 **the Terms of the Parties' Agreements.** Many of the purported damages claimed
16 by Monarch in this case arise out of its medical cost containment fees, the method
17 for which was established in the parties' CSAs. Monarch argues that SRS should
18 have applied a different method in charging Monarch for these costs. SRS' position
19 is that Monarch agreed to and understood the "27% cost of savings" term in the
20 contracts, and cannot now challenge it because it wishes it had chosen another
21 option. In addition, the 2005 and 2006 CSAs contain a ninety-day (90) challenge
22 provision to which Monarch agreed, which stated that Monarch had to challenge any
23 bill in writing within ninety (90) days of the date the amount was due SRS. SRS
24 takes the position that Monarch has waived the right to challenge any amounts due
25 under bills which were not challenged according to this provision. SRS should not
26 be allowed to introduce any parol evidence or other evidence that contradicts the
27 unambiguous terms of the contracts.

28

1 i. **L.R. 16-4.1(i): Identification of Issues of Law Germane to**
2 **the Case, and SRS' Position as to Those Issues.**

3
4 (1) Monarch cannot contradict the terms of the Medical Bill
5 Repricing ("MBR") Provisions of the CSAs.

6 Many of the purported damages claimed by Monarch in this case arise out of
7 its medical cost containment fees, the method for which was established in the
8 parties' CSAs. Monarch argues that SRS should have applied a different method in
9 charging Monarch for these costs. SRS' position is that Monarch agreed to and
10 understood the "27% cost of savings" term in the contracts, and cannot now
11 challenge it because it wishes it had chosen another option.

12
13 (2) Monarch waived its right to challenge any amounts owed
14 under bills that were not challenged within ninety days.

15 The CSAs and Amendment No. 1 required Monarch to notify SRS, in
16 writing, of any disputes relating to billed amounts on claims within 90 days after the
17 date payment was due SRS. They explicitly stated that, if Monarch failed to notify
18 SRS of any dispute in writing within 90 days, it waived its right to dispute the bill.
19 Monarch has waived its right to dispute the amounts owed on any invoices about
20 which it failed to complain, in writing, within 90 days of the due date.

21
22 For example, SRS will show that it provided a number of invoices to
23 Monarch's broker, Peggy Drew, in July of 2009. To the extent Monarch failed to
24 dispute any or all of those bills within 90 days of the date payment was due,
25 Monarch still owes SRS all amounts stated on the invoices plus late fees.

(3) Monarch's Unfair Competition Law ("UCL") claim fails as a matter of law.

Monarch's UCL claim is based upon three separate purportedly unfair business practices: 1) SRS mishandled and overpaid claims made under Monarch's workers' compensation Policies in such a manner as to artificially increase Monarch's collateral requirements and premiums for which it seeks restitution; 2) SRS' charging Monarch under the bill review formula set forth in the CSAs for which Monarch seeks restitution; and 3) SRS alleged refusal to comply with California Labor Code Section 3762 for which Monarch seeks an injunction.

A. Monarch Lacks Standing to Assert a UCL Claim for Restitution

Monarch lacks standing to pursue its UCL claim. Under the UCL, a plaintiff must allege that it "suffered injury in fact *and* has lost money or property *as a result of* such unfair competition." Cal. Bus. & Prof. Code § 17204 [emphasis added]; Californians for Disability Rights v. Mervyn's, LLC, 39 Cal.4th 223, 228 (2006). A plaintiff lacks standing to bring a UCL claim unless it has suffered losses that would entitle it to restitution. To recover under the UCL, a plaintiff "must demonstrate some form of economic injury" that "was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 322-323 (2011) [emphasis in original]; Only the equitable remedies of restitution and/or injunctive relief are available under the UCL. See Cal. Bus. & Prof. Code § 17203; Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1144 (2003).

Under the UCL, compensatory damage claims do not qualify as "restitution" claims sufficient to confer standing. To the contrary, California courts strictly limit monetary remedies available under the UCL to restitution, and *do not allow for the recovery of compensatory damages*. Cel-Tech Communications v.

1 L.A. Cellular Telephone Co., 20 Cal.4th 163, 179 (1999); Bank of the West v.
 2 Superior Court, 2 Cal.4th 1254, 1266, 1273 (1992).

3 Under the UCL, restitution means "the return of money or property that
 4 was once in [the plaintiff's] possession" or money in defendant's possession in which
 5 the plaintiff has a present "vested ownership interest." Korea Supply Co. v.
 6 Lockheed Martin Corp., *supra*, 29 Cal.4th at 1149; Cortez v. Purolator Air Filtration
 7 Products Co., 23 Cal. 4th 163, 172 (2000); Day v. AT&T Corp., 63 Cal.App.4th
 8 325, 340 (1998) (restitution means that "[t]he offending party must have obtained
 9 something to which it was not entitled *and* the victim must have given up something
 10 which he or she was entitled to keep" [emphasis in original]). As set forth below,
 11 Monarch has not, and cannot, meet the stringent standing requirement under the
 12 UCL.

13
 14 **1. Monarch lacks standing because it suffered no injury in fact**

15 Under the UCL, "the *actual payment* of money by a plaintiff"
 16 constitutes an "injury in fact." Troyk v. Farmers Group, Inc., 171 Cal.App.4th 1305
 17 (2009). Monarch has not parted with the money it seeks to recover as restitution
 18 under its UCL claim. To the contrary, it has not paid the SRS invoices that are at
 19 issue.

20 In its first UCL claim, Monarch contends that SRS' claims handling
 21 resulted in artificial increases in the collateral and premium obligations that *it owes*
 22 *to AIG*. Monarch's allegations establish that AIG, not SRS, purportedly benefitted –
 23 through the possibility of higher premiums and collateral requirements – from SRS'
 24 alleged mishandling. Monarch's allegations concede that any payments were made
 25 to AIG.⁵ Monarch's admission that AIG, not SRS, received the alleged illicit profits
 26

27 ⁵ Although Monarch has become indebted to AIG and SRS, it has not actually paid
 28 all of the losses and expenses incurred for its workers' compensation claims.

1 from SRS' misconduct confirms that Monarch has not suffered an injury-in-fact for
2 which it can recover against SRS.

3 In its second UCL claim, Monarch alleges that it was overcharged for
4 bill review fees. While it is true that Monarch was invoiced for medical bill review
5 expenses, in accordance with the CSAs, the undisputed evidence is that Monarch
6 ***has not paid SRS*** for the allegedly overbilled fees. Because it has not yet parted
7 with the amounts it seeks to recover, it has not made an ***actual payment*** of money,
8 has not suffered injury in fact, and lacks standing to pursue its UCL claim.

9
10 **2. Monarch has not adequately alleged the loss of money or property**
11 **subject to restitution**

12 Monarch does not allege that it lost any money or property *as a result*
13 of SRS' alleged wrongful conduct in handling Monarch's claims. Although it alleges
14 that SRS mishandled its claims, it does not allege, nor can it, that it gave money or
15 property to SRS as a result of the claims handling. There is simply no factual
16 allegation supporting a restitution claim. See Day v. AT&T, 63 Cal.App.4th 325,
17 340 (1998) (noting that the Legislature used the word "restore" meaning "[t]o give
18 back, to make return or restitution of" anything previously taken away or lost").

19 Monarch's claim fails for lack of allegations or evidence that SRS has
20 garnered illicit profits as a result of any claims handling or mishandling. To the
21 extent that Plaintiff alleges it suffered "inflated premiums" or increased collateral
22 requirements, Monarch concedes that ***it does not owe and did not pay SRS*** any of
23 those amounts.

24 Likewise, Monarch's claim for overbilled medical review expenses fails
25 to sufficiently allege the loss of money or property subject to restitution. Despite
26 Monarch's allegations, SRS billed Monarch in exact compliance with the written
27 provisions of the CSAs. Yet, Monarch has persistently refused to pay SRS its
28 invoiced Service Fees or to reimburse the invoiced losses and expenses incurred for

1 Monarch's workers' compensation claims. Until and unless Monarch actually parts
 2 with money or property as a result of SRS' allegedly wrongful conduct, it cannot
 3 maintain a UCL claim for restitution.

4
 5 **B. Monarch Is Not Entitled to Restitution on any of its UCL Claims**

6 Restitution is appropriate only "as may be necessary to restore . . . any
 7 money or property . . . acquired by means of such unfair competition." Restitution
 8 is only available as "disgorgement of money that has been wrongfully obtained"
 9 from an unfair business practice. Bank of the West v. Superior Court (Industrial
 10 Indemnity Co.), 2 Cal.4th 1254, 1266 (1992); Dinosaur Development, Inc. v. White,
 11 216 Cal.App.3d 1310, 1315 (1989) ("restitution" refers to the "return or restoration
 12 of a specific thing or condition"). The remedy is meant to prevent "unjust
 13 enrichment," meaning the "result or effect of a failure to make restitution of or for
 14 property or benefits received under such circumstances as to give rise to a legal or
 15 equitable obligation to account therefor." Id.

16 Monarch is not entitled to "restitution." The evidence establishes that
 17 Monarch owes SRS \$1.1 million dollars for unpaid Service Fees and losses and
 18 expenses invoiced on its claims. Whether Monarch's debt results, as it alleges, from
 19 SRS' alleged claim mishandling is irrelevant to its restitution claim, because
 20 Monarch has not ***paid*** the medical bill repricing costs for which it suggests its
 21 entitled to restitution. Monarch's mere indebtedness to AIG or SRS for certain
 22 amounts does not entitle it to restitution or disgorgement of yet to be received
 23 profits. Restitution is therefore not an available remedy. Monarch's UCL claim
 24 arising out of the alleged mishandling of Monarch's claims and medical bill
 25 repricing therefore fail as a matter of law.

1 **C. Monarch Is Not Entitled To An Injunction**

2 The primary jurisdiction doctrine bars injunctive relief under the UCL
 3 when the practice sought to be enjoined implicates expertise better suited to
 4 administrative oversight. See, e.g., Jonathan Neil & Assoc., Inc. v. Jones, 33
 5 Cal.4th 917, 931-932 (2004) (primary jurisdiction barred injunctive relief claim
 6 regarding insurance premium billing dispute); Farmers Ins. Exch. v. Sup. Ct., 2
 7 Cal.4th 377, 401 (1992) (same, regarding good driver discounts in automobile
 8 insurance case); see also Desert HealthCare Dist. v. PacificCare FHP, Inc., 94
 9 Cal.App.4th 781, 795-796 (2001) (abstaining from issuing an injunction involving
 10 appropriate levels of capitation charges in the heavily regulated health care finance
 11 industry).

12 TPAs, such as SRS, are heavily regulated by the California Department
 13 of Industrial Relations, and are subject to training and other requirements. Cal. Lab.
 14 Code § 3702.1. TPAs are also subject to penalties and fines, and can be audited by
 15 the Department of Industrial Relations. Cal. Lab. Code § 3702.7; §§ 129, 129.5.

16 Here, any conceivable injunctive relief would require the Court to
 17 supervise TPA practices that are far better suited to regulatory expertise and
 18 oversight. Monarch contends that SRS engaged in unfair business practices based
 19 on the manner in which SRS incurred bill review costs and charged Monarch for
 20 medical bill repricing. Any injunctive relief would require the Court to supervise
 21 SRS' CSAs and determine whether SRS is following accepted standards and
 22 guidelines when conducting its medical bill repricing functions. Such injunctive
 23 relief would pull the Court "deep into the thicket" of the heavily regulated TPA
 24 industry, and would require determinations that are better suited for administrative
 25 expertise. See Desert HealthCare Dist., 94 Cal.App.4th at 796.

1 (4) SRS Is Entitled to Recover its Attorneys' Fees in this
 2 Action.

3 The 2005 and 2006 CSAs state that "[i]n any litigation or arbitration
 4 between the parties, the prevailing party shall be entitled to reasonable attorneys'
 5 fees and all costs incurred in enforcing this Agreement." California law permits
 6 enforcement of attorneys' fees provisions in contract disputes. Cal. Civil Code
 7 § 1717; see In re Tobacco Cases I, 193 Cal.App.4th 1591 (2011). As a result, if
 8 SRS prevails in this action, it is entitled to reasonable attorneys' fees per the parties'
 9 agreement.

10
 11 (5) SRS Is Entitled to Late Fees.

12 The 2005 and 2006 CSAs also state that [i]f balances are not received
 13 in full by SRS within thirty (30) days of the billing date or within 72 hours of the
 14 bill issuance ... [Monarch] will pay SRS a late charge of one and one-half percent
 15 (1.5%) of the outstanding bill for each subsequent thirty-day period or any part
 16 thereof until SRS receives all amounts due." As a result, SRS is entitled to late fees
 17 of 1.5% per month on each bill that is more than 30 days overdue.

18
 19 **III.**

20 **L.R. 16-4.2** [Abrogated]

21
 22
 23 **IV.**

24 **L.R. 16-4.3: BIFURCATION OF ISSUES**

25 SRS requests that the court phase the trial in order to determine certain
 26 overarching contract interpretation issues before embarking on a claim-by-claim
 27 analysis. Many of the purported damages claimed by Monarch in this case arise out
 28 of its medical cost containment fees, the method for which was established in the

1 parties' CSAs. Monarch argues that SRS should have applied a different method in
 2 charging Monarch for these costs. SRS' position is that Monarch agreed to and
 3 understood the "27% cost of savings" term in the contracts, and cannot now
 4 challenge it because it wishes it had chosen another option.

5
 6 In addition, the 2005 and 2006 CSAs contain a ninety-day (90)
 7 challenge provision to which Monarch agreed, which stated that Monarch had to
 8 challenge any bill in writing within ninety (90) days of the date the amount was due
 9 SRS. SRS takes the position that Monarch has waived the right to challenge any
 10 amounts due under bills which were not challenged according to this provision.

11
 12 SRS has filed Motions *in Limine* on these two issues, and it would
 13 greatly assist the parties and the Court to determine these broad legal issues before
 14 assessing the individual claims.

15
 16 V.

17 **L.R. 16-4.4: JURY TRIAL**

18 The parties have waived the right to a trial by jury.

19
 20 VI.

21 **L.R. 16-4.5: ATTORNEYS' FEES**

22 The 2005 and 2006 CSAs state that "[i]n any litigation or arbitration
 23 between the parties, the prevailing party shall be entitled to reasonable attorneys'
 24 fees and all costs incurred in enforcing this Agreement." California law permits
 25 enforcement of attorneys' fees provisions in contract disputes. Cal. Civil Code
 26 § 1717; see In re Tobacco Cases I, 193 Cal.App.4th 1591 (2011). As a result, if
 27 SRS prevails in this action, it is entitled to reasonable attorneys' fees per the parties'
 28 agreement.

VII.

L.R. 16-4.6 ABANDONMENT OF ISSUES

None.

DATED: November 13, 2014

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By /s/ Justine M. Casey
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